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CHARLES ELMORE

No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1929

PIEDMONT AND NORTHERN RAILWAY COMPANY, AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, *et al*

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

Jurisdictional Statement for Appellants Under Rule 12

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Jurisdictional Statement for Appellants Under Rule 12

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A. THE STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C. Tit. 28, Sec. 345), provides as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> (4). So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 208, 219-220 (U. S. C. Tit. 28, Sec. 41 (28), 47 and 47-a) confers jurisdiction upon the District Court of suits brought to enjoin, set aside, annul, or suspend "in whole or in part any order of the Interstate Commerce Commission," and, with respect to review by the Supreme Court of decrees entered in such suits, provides as follows:

"A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

B. DATE OF DECREE, AND DATE OF APPLICATION FOR APPEAL

The final decree sought to be reviewed was entered on February 6, 1929 (R. 302).[1]

The application for appeal was presented on March 11, 1929, and the order allowing the appeal was entered on March 13, 1929 (R. 315).

C. NATURE OF THE CASE AND RULINGS BELOW

The appellant, Piedmont and Northern Railway Company, upon notice from the Interstate Commerce Commission,[2] filed an application with the Commission for a certificate of Public Convenience and Necessity for the construction of certain lines of its electric railway. In its application,

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[1]References are made to pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court, as the record has not yet been printed.

[2]"You are, therefore, advised that before the Piedmont and Northern constructs any extensions to its line or issues any securities it will be expected to file appropriate applications for authority therefor under Sections 1 and 20-a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention" (R. 162).

appellant reserved the right to assert that the Commission was without authority in the matter, but asked that, if the Commission should hold otherwise, the certificate should be granted (R. 24, 26).

Paragraphs 18 and 22 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, Ch. 91, 41 Stat. 456, 474, 477, 478 (U. S. C. Titl. 49, Sec. 1, 18-22), provide respectively as follows:

> "18. After ninety days after this paragraph takes effect, no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or the extension thereof, * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation or construction and operation, of such additional or extended line of railroad, * * * "

> "22. The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of a street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Appellant asserted before the Commission that no certificate was required or authorized under paragraph 18 of Section 1 of the Act for the following reasons:

(1) The appellant and the lines sought to be completed were "interurban electric railway * * * not operated as a part * * * of a general steam railroad system of transportation," within the meaning of paragraph 22, and were therefore excluded from the operation of paragraph 18; the proposed lines were to be used to render that type of local service peculiar to interurban electric railways. (See *United States* v. *Village of Hubbard*, 266 U. S., 474, 480;

(2) The lines to be completed were essential parts of an entire unitary project, the construction of which was begun in a substantial way and in good faith prior to the enactment of paragraph 18; thus the case was one of completion of existing lines and not of their extension; the completion of the project was never abandoned, but was prosecuted with due diligence under all the circumstances (See *Detroit Terminal Ry. Co.* v. *Penn-Detroit Ry. Co.*, 15 F. (2d) 507 (C. C. A. 6th). These questions with respect to the Commission's authority were duly reserved throughout the proceedings (R. 24, 41, 46).

The Commission, however, entered an order (R. 107) assuming authority and denying the application for a certificate of Public Convenience and Necessity. (*Proposed construction of lines by Pied-*

mont and Northern Railway Company, Finance Docket No. 6208, 138 I. C. C. 363).

Thereafter, appellant brought this suit under the Urgent Deficiencies Act (Ch. 32, 38 Stat. 220; U. S. C. Tit. 28, Secs. 41 (28) and 47, 47-a) to enjoin, set aside and annul that part of the above mentioned order of the Commission assuming authority over appellant under paragraph 18. A statutory court of three judges was accordingly organized. Appellant again asserted the grounds for its contention that the Commission was without authority, i.e., (1) that it was an interurban electric railway, and (2) that construction was begun before the effective date of the Act (R. 8). The court, however, rejected both grounds and sustained the authority of the Commission. A final decree was entered dismissing appellant's petition (R. 302). (Opinion reported *Piedmont and Northern Ry. Co.* v. *United States*, 30 F. (2d) 421). This appeal was taken from that final decree (R. 315).

D. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS APPEAL

(1) No complaint is here made with respect to that part of the order merely refusing a certificate of Public Convenience and Necessity. A review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied. (See *Chicago Junction* case, 264 U. S. 258, 264).

But the challenge is directed to that part of the order affirmatively declaring the status of appellant as a carrier within the operation of paragraph 18 of Section 1 of the Act. This part of the order was not the result of an administrative function of the Commission, nor was it requested by the appellant. On the contrary, it was a judicial determination of the scope of the statutory authority of the Commission, the occasion for which was brought about solely at the instance of the Commission itself, and over the objection of the appellant (R. 162). The question whether, upon the facts established, the Commission exceeded its authority under paragraph 18, and thereby deprived appellant of the immunities expressly conferred by paragraph 22 upon interurban electric railway, is purely a question of law and clearly subject to judicial review.

As this Court said, in the *Intermountain Rate Cases* (234 U. S. 476, at 490) in response to a contention that an order was "purely negative" and not subject to "judicial inquiry."

> " * * * the proposition disregards the fact that the right to petition the commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses *that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist.* It is of course true * * * that findings of fact made by the commission within the

scope of its administrative duties must be accepted * * * but that doctrine * * * does not relieve the courts in a proper case from determining whether * * * statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given * * *" (italics ours).

Accordingly, in the *Tap Line Cases* (234 U. S. 1, 10, 22) an order declaring tap lines to be "plant facilities", not "railroads", and denying their application for division of rates was held judicially reviewable. And in *United States* v. *American Ry. Express Co.*, 265 U. S. 425, an order declaring the status of an express company to be other than that of a "carrier by railroad" was reviewed.

The distinguishing features of such an order affecting a status, which is subject to judicial review, are made manifest, by way of contrast, through the statement of this Court in *United States* v. *Los Angeles and S. F. R. R. Co.*, 273 U. S. 299, 309, 310, characterizing the type of order not subject to review:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or

criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

(2) That the issue whether appellant is the type of carrier requiring a certificate under paragraph 18 for the "extension" of its lines is justiciable and not declaratory or advisory in character appears from the statement of this Court in *Texas and Pacific Ry. Co.* v. *Gulf etc. Ry. Co.*, 270 U. S. 266, 272-273, as follows:

"Paragraph 18 prohibits construction of an extension without obtaining a certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate * * * Whenever such an application is made, the commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the commission, necessarily admit that they constitute an extension. *It may secure a determination of the question,* without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track * * * The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party

in interest opposing construction is entitled as of right to an injunction. The issue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier * * * If the facts are agreed, the question is one of law." (Italics ours).

The mere form of the order entered, incorporating findings contained in the Commission's report, and dismissing the petition without more, does not change its inherent character. The effect of the order in the present case was to grant to various steam railways (which intervened and opposed the petition) the affirmative relief which they sought, namely, that appellant be prevented from constructing the proposed lines, and, as a means of bringing about this end, that the Commission should assume authority over appellant under paragraph 18, and that the certificate required by said paragraph be denied.

Had the Commission refused the relief sought by the intervenors, and had it permitted appellant to construct its lines, the intervenors would have had the right, on the authority of the *Chicago Junction* case, 264 U. S. 258, 264, to sue to annul any order of the Commission allowing appellant to complete its lines.

It follows that appellant can sue to annul an order granting the relief sought by the intervenors. As said by this court in the case of *United States* v. *New River Co.*, 265 U. S. 533, 537, 539, 541, (where a like order dismissing a petition was entered):

> "The effect of the order is to grant the relief sought by the operators of local mines (the intervenors),"

That appellant has suffered legal injury by reason of the order is obvious (see *Chicago Junction* case, 264 U. S. 258). It in effect commands appellant not to build the lines, for unless the status established by the order is removed, appellant cannot construct the proposed lines without subjecting itself to fines and penalties (Sec. 1 (20) of the Act) or issue new securities (Sec. 20-a of the Act) or be free to exercise the power of eminent domain. (See *Alabama and Vicksburg Ry. Co.* v. *Jackson etc. Ry. Co.*, 271 U. S. 244).

(3) The following decisions are also believed to sustain the jurisdiction of this court on appeal:

> *The St. Louis and O'Fallon Railway Co., et al.* v. *United States et al.*, No. 131, October Term, 1928, Supreme Court of the United States, decided May 20, 1929.
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> *United States et al.* v. *Missouri P. R. Co.*, No. 19, October Term, 1928, Supreme Court of the United States, decided January 2, 1929.

Baltimore and Ohio R. R. Co. v. *United States,* 277 U. S. 291.

Brimstone R. and C. Co. v. *United States,* 276 U. S. 104.

Cleveland C. C. and St. L. R. Co. v. *United States,* 275 U. S. 404.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of paragraph (4) of Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

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